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In The

Supreme Court of the United States

October Term, 1953.

No. 329.

T. W. JONES GRAIN COMPANY, PETITIONER,

V.

STATE OF NEBRASKA, RESPONDENT.

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CLARENCE S. BECK,
Attorney General,
DEAN G. KRATZ,
Assistant Attorney General,
Attorneys for Respondent.

JURISDICTION.

That a Federal question is involved in this case is not disputed by the respondent. Art. 1, Sec. 8, Clause 3, is the commerce clause of the Constitution of the United States, and our facts show that a contract was entered into between the petitioner, a Nebraska grain

company, and the Klecan Grain Company of Kansas City, Missouri, and that the contract contemplated the transportation of grain from the State of Nebraska to the State of Missouri.

QUESTION PRESENTED.

Whether grain stored in the petitioner's warehouse on March 10 (tax day), had on that date, by virtue of a contract with an outstate corporation, ceased to be a part of the general mass of property in the State of Nebraska subject to state taxation?

DECISIONS BELOW.

The respondent accepts as substantially correct the petitioner's review of the previous court decisions of this case found on page ten of his brief.

DECISION OF THE SUPREME COURT OF NEBRASKA.

The Nebraska Supreme Court applied a fundamental rule in deciding this case. That rule, set out in syllabus number 8 (R43), is from the case of *Coe* v. *Errol*, 116 U. S. 517, 6 S. Ct. 475, 29 L. Ed. 715, and says as follows:

> "Goods do not cease to be part of the general mass of property in the state, subject as such to its jurisdiction and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another state or have started upon such transportation in a continuous route or journey."

Syllabus number 9 (R43) sets out another fundamental rule:

"The fact that property is intended or destined for removal from a state into another state does not impress it with the character of interstate commerce so as to render it immune from state taxation by virtue of the operation of the commerce clause of the federal Constitution."

STATEMENT OF FACTS.

The petitioner is a grain broker engaged in the business of buying and selling grain. His place of business is Trenton, Hitchcock County, Nebraska. On February 2, 1951, he entered into a contract with the Klecan Grain Company of Kansas City, Missouri. The contract was for ten cars of grain, and contained the following conditions (Exhibit No. 6, R39 and 40): (1) All cars must be loaded to not less than capacity required by the railroads; (2) Grain must be shipped within sixty days; and (3) Delivery of the grain on the contract could not be perfected until the grain reached its destination and was inspected and weighed.

There is no specific showing as to how much grain the petitioner had on hand on the date of entrance into the contract (Feb. 2). Testimony shows that petitioner had grain on hand valued at $19,915.00 on February 10 (R29), eight days subsequent to his entering the contract with the Klecan Grain Co., and there is also testimony to the effect that this figure ($19,915.00) was reached through an evaluation of $1.00 per bushel (R18) which indicates there was probably about 20,000 bushels of grain in the warehouse on the date of entering the contract.

By March 10, 1951, tax day in the State of Nebraska (Sec. 77-1201, R. R. S., 1943, Nebraska), only five car-

loads of grain had been shipped under the contract (R32). The remaining five carloads of wheat, constituting approximately 10,000 bushels of grain, were all received by the Klecan Grain Company subsequent to March 10, 1951.

On March 10, 1951, petitioner had in his warehouse over 10,000 bushels of grain. He reported, on his tax return, approximately 150 bushels (R27 and 25). The other approximate 10,000 bushels he did not report for taxation as he claimed it did not belong to him, but belonged to the Klecan Grain Co. of Kansas City, Missouri (R22,23).

Payment for the grain in this transaction was arranged by attaching a sight draft to the bill of lading when the grain was dispatched (R34). When the grain arrived at its destination it was inspected, the grade determined, and the final price then set (R35). In each instance the price on the sight draft varied from the price set after the arrival of the grain at its destination (R35).

ARGUMENT.

That a federal question is involved in this case is not disputed. The question, however, is one that has been presented to this court before, and thus should not be considered again.

The law in this case has been settled since 1886, when the U. S. Supreme Court decided the case of *Coe* v. *Errol*, 116 U. S. 517, 6 S. Ct. 475, 29 L. Ed. 715, and established the following rule:

> "* * * goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey."

This rule has been variously applied since that date, and stands as the applicable rule of law in the case presented to you in this instance by the T. W. Jones Grain Co. The rule is easily applied to our situation: The grain quite obviously had not been shipped on March 10; it had not been entered with a common carrier on March 10, as it rested in the warehouse on that date; and it had not been started upon such transportation in a continuous route or journey.

Appellee rests his appeal on the contention that the grain, by virtue of the contract, had begun its movement in a continuous route or journey into interstate commerce. This contention has absolutely no merit.

The Nebraska Supreme Court's recital of the facts of this case contains the following (R43,44):

> "Appellee had in the elevator about 20,000 bushels of wheat on February 2, 1951, and it on that date by contract in writing obligated itself to sell to Klecan Grain Company, Kansas City, Missouri, 10 capacity boxcars of No. 1 hard wheat of stated grades and specified prices to be delivered within 60 days to the purchaser f. o. b. at Kansas City, Missouri."

And at another point (R46) the Nebraska Court says this:

"The grain in question was owned by appellee and was in its elevator in Trenton as early as February 2, 1951. It was not selected, identified, or set apart as the wheat or any part of the wheat contracted to be sold and delivered to the Klecan Grain Company of Kansas City, Missouri. It could not have been because the contract designated that city as the place for determination of the grain that would be acceptable in satisfaction of the contract."

Thus, when appellee entered this contract he had mingled together in his warehouse 20,000 bushels of grain. He contracted to deliver to the purchaser, Klecan Co. of Kansas City, Missouri, 10,000 bushels of grain, but, of course, there was no specification that it be any particular portion of the grain then on hand. As a matter of fact, it needn't be any of the 20,000 bushels then on hand, but could be some purchased by the appellee at a later date. Therefore, since the Klecan Grain Co. had not contracted for any specific grain, the appellee was free to dispose of the grain he had on hand on the 2nd day of February and that grain he had on hand on the 10th day of March in any way he pleased, the only condition being that he deliver 10,000 bushels of grain (any grain) within 60 days after entering the contract. The 10,000 bushels on hand on March 10 did not belong to the Klecan Grain Co., and appellee was under absolutely no obligation to send it to Kansas City. He could have sold it in Nebraska, acquired another 10,000 bushels of grain, and shipped that grain to the Klecan Co. in complete satisfaction of the contract.

Clearly, the 10,000 bushels of grain in appellee's warehouse on March 10 had not started a continuous

route or journey. It could have been diverted at any time thereafter without violation of any contractual obligation. On March 10, it belonged only to the appellee, and under the established rule of *Coe* v. *Errol*, supra, it should have been taxed to him.

Appellee, in behalf of his contention that this grain had on March 10 already started its continuous journey, cites to you cases where the merchandise had actually begun the journey towards its destination. Cases such as those involving logs which have started down the river and then come to rest temporarily in some location. Those cases, of course, have no application here, and the decision of the Nebraska Supreme Court in the instant matter does not contradict any precedent established therein. In spite of all his avowals regarding the failure to obtain railroad cars and his assertion that the goods were not retained for his pleasure, will, use, convenience, etc., appellee cannot avoid the fact that this grain rested in appellee's warehouse on March 10, it was not the specific grain which the Klecan Grain Co. contracted for, it had not in any sense (such as the merchandise in appellee's citations) started its journey, it belonged only to the appellee, and was his to do with whatever he wished.

The rule in the case of *Coe* v. *Errol*, supra, has been explained an interpreted as follows by this court:

> "Thus, it is not enough that there is an intent to export, or a plan which contemplates exportation, or an integrated series of events which will end with it. The property must have been actually started upon its journey or transit to the foreign destination."
>
> *Empresa Siderurgica, S. A.* v. *Merced County*, (1949) 337 U. S. 154.

"It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is certainty that the goods are headed for their foreign destination and will not be diverted to domestic use. Nothing less will suffice."

Empresa Siderurgica, S. A. v. *Merced County,* (1949) 337 U. S. 154.

"It must appear that the movement for another State has actually begun and is going on."

Hughes Bros. Timber Co. v. *Minnesota,* (1926) 272 U. S. 468.

"The mere fact that a portion of an entire lot of goods purchased for export has been shipped out of the country on the tax date does not impress the remainder with the character of export so as to exempt it from local taxation."

Empresa Siderurgica, S. A. v. *Merced County,* supra.

"The safer and better rule is the one indicated, to consider property actually in transit as belonging to the place of its destination, and property not in transit as property in the place of its situs, without regard to the intention of the owner, or his residence in or out of the state."

Carrier v. *Gordon,* (1871) 21 Ohio St. 605.

"Not only is a mere intention to export an article or commodity insufficient of itself to exempt it from state taxation, but the rule appears to be that a movement merely in preparation for export—in other words, a mere transfer of the property to a depot or other place within a state from which the transportation or journey to another state is to begin at a convenient time, is not a part of that transportation, so as to exempt the property be-

cause of such transfer or movement, from state taxation."

Champlain Realty Co. v. *Brattleboro,* 260 U. S. 366, 67 L. Ed.

"Until the property is shipped or started on its final journey out of the state, it may be taxed."

Diamond Match Co. v. *Otonagon,* (1903) 188 U. S. 82.

"The mere fact that interstate movement is contemplated, if it has not begun, does not withdraw the property from the state's power to tax it."

Minnesota v. *Blasius,* 78 L. Ed. 131, 290 U. S. 1.

"So in this case it is not enough that on the tax date there was a purpose and plan to export this property. Nor is it sufficient that in due course that plan was fully executed. Part of the plant that is taxed was dismantled, but it had not been delivered to any carrier for export or otherwise started on its journey on the tax date. It might still have been diverted into the domestic market. The fact that any such diversion would entail a breach of contract, that a part of the plant had already started on its export journey, that an export license had been obtained and a letter of credit deposited in this country increased the expectation on the tax date that exportation of the entire plant would eventuate. But that prospect, no matter how bright, does not start the process of exportation."

Empresa Siderurgica v. *County of Merced,* supra, 93 L. Ed. 1276, 337 U. S. 154.

"While in storage, the gasoline might have been diverted to domestic markets without disruption of any existing arrangement for its transhipment and without even breach of any contractual commitment to a foreign purchaser. Neither the character of the property nor any event equivalent to

> its redelivery to a common carrier made export certain for all practical purposes."
>
> *Joy Oil Co.* v. *State Tax Commission,* 93 L. Ed. 1366, 337 U. S. 286.

The Kentucky Court, in *Ayer & Lord Tie Co.* v. *Koewn,* 93 S. W. 588, interpreted and applied the rule of the Coe case as follows (on rehearing):

> "Under the allegations of the petition appellant might have sold the ties while waiting for the barges to be loaded on, or it might have changed its plan and shipped them to some point in this state. There is nothing to show that appellant had lost control over the property, or that it had started finally on its journey out of the state."

The important facts in this case, so far as an evaluation of appellee's argument and cases in support thereof are concerned, are (1) that the Klecan Grain Co. did not contract with the appellee, T. W. Jones Grain Co., for any specific, designated, identified 10,000 bushels of grain, and therefore the grain in appellee's warehouse on March 10 belonged only to the appellee and could have been diverted in any manner without disrupting any existing arrangement for its shipment to Kansas City, Missouri, and (2) that the grain was in the warehouse on March 10, with other grain, had not been separated or set apart, had not been placed in any vehicle which could be termed a common carrier, and had not, by any stretch of construction, "begun" a movement in interstate commerce.

These important facts distinguish appellee's cases and make this case one which falls directly under the rule of *Coe* v. *Errol,* supra. The issue involved in this case,

then, was decided 67 years ago. It has been confirmed countless times since that date, and in the Empresa Siderurgica case this court applied the rule of the Coe case to a fact situation identical to the one presented to you in this case. If this court deems the rule established in the Coe case to be wrong, or if you feel your interpretations of this rule, as set out in the Empresa Siderurgica case and other cases cited herein, are wrong, then you should by all means grant the writ of certiorari in this case. If you deem those decisions to be correct, then you must conclude that the law is well settled in the instant situation, and that you are far too busy to spend any time with a matter which was decided sixty-seven years ago.

We respectfully submit that the writ of certiorari in this case be denied.

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